has currently been a user of the land in question for public purposes, but we do not accept this, this would be unlawful and in breach of the conditions of title in the light of the first and third of the special conditions. In any event even if public sporting events have been held on the land this does not constitute user for a public purpose as the land hitherto was vested in a trustee for a private entity which is governed by its constitution and rules, and any use thereof for public sporting events would and must necessarily be at the discretion of the Association and subject of course to the payment of fees and other charges to it.

In the premises, *cadit quaestio* — the question falls.

(4) *Failure to comply with the provisions of section 9(1)(b)*

Section 9(1)(b) prescribes that upon the publication of the declaration in Form D pursuant to section 8 the Collector or other registering authority shall make a note of the intended acquisition under subsection 2(a) thereof upon the register document of title. Section 10(1) provides that the Collector shall, having completed the action required by section 9, commence proceedings for the acquisition of the land by giving public notice in Form E. In the matter before us the declaration in Form D under section 8 was gazetted on May 21, 1981 and Form E was issued on June 12, 1981 but the requisite notation under section 9(1)(b) on the register document of title was entered only on July 28, 1981. The argument posited by the appellants is that the provisions of section 9(1) are mandatory and failure to comply with them vitiated the acquisition purported to have been effected in view of section 10(1).

The issue accordingly revolves into the question as to whether the provisions of section 9(1) are mandatory or directory. We need only refer to *Pow Hing & Anor.* v. *Registrar of Titles, Malacca*[13] (at page 157) with regard to the connotation of this dichotomy, and applying the test laid down in the judgment of this court in that case for the distinction between mandatory and directory requirements in a statute and having regard to the conclusive evidence clause stipulated in section 8(3) and the fact that section 8(1) requires the declaration in Form D to be published in the *Gazette* for general information, we are of the view that the provisions of section 9(1)(b) are directory and not mandatory as its purpose is in substance also covered by the publication of the declaration in Form D in the *Gazette* under section 8(1).

This court has also in *Ng Yit Seng & Anor.* v. *Syarikat Jiwa Mentakab Sdn. Bhd. & Ors.*[24] dealt (at page 195) with the doctrine of substantial compliance in regard to directory requirements. This has in our view been met in this case as there is no specific time limit stipulated in section 9(1) and the omission was in fact repaired and the requisite notation made some two months after the publication of the declaration in Form D. The question raised by this issue would moreover appear to be of academic interest as we are told by Senior Federal Counsel appearing for the respondents that Forms E and F were re-issued *de novo* after judgment in the High Court, and in any event what is in fact and in essence impugned is the acquisition purported to be effected by the publication of the declaration in Form D under section 8 which is the nub of the objection around which the case for the appellants revolves and not the subsequent proceedings for an inquiry as to claims to compensation.

Conclusion

For the reasons we have given and in the light of the law we have adumbrated we dismissed this appeal with costs at the conclusion of argument and directed the security lodged in court to be paid out to the respondents to account of their costs.

Appeal dismissed.

Solicitors: *Shook Lin & Bok.*

THE "LOON CHONG"; THE "LOON CHONG" OWNERS & ORS. v. ENG HONG TRADING CO. SDN. BHD.

[F.C. (Raja Azlan Shah C.J. (Malaya), Abdul Hamid F.J. & Abdoolcader J.) November 17, 1981 & January 16, 1982]

[Penang — Federal Court Civil Appeal No. 241 of 1980]

Shipping Law — Bareboat lease agreement — Beneficial ownership of ship — Monetary claim in respect of necessaries supplied to ship — Action in rem against ship — Whether maintainable.

In this case the respondents issued a writ for a monetary claim in respect of the appellant's ship "Loon Chong" and her sister ship "Loon Hsing" for goods in the nature of necessaries supplied on account of the two ships. The owners of the "Loon Chong" were Melbourne Plaza Navigation (Panama) S.A. and the owners of the "Loon Hsing" were Keras (Panama) S.A. The ships were sold to the owners by Lord Steamship Co. S.A. Panama under bills of sale but immediately afterwards the owners entered into bareboat lease agreement with Lord Steamship Co. S.A. (Panama) in respect of the two ships. The "Loon Chong" was, as a result of the claim by the respondents, arrested but later released on bail. The appellants applied for an order to set aside the writ on the ground that the action *in rem* was not maintainable against the appellants as the owners of the "Loon Chong". Arulanandom J. held that the bareboat lease agreement was not a lease but a mortgage under a guise of a lease and he accordingly dismissed the application. The appellants appealed.

Held: the ship in this case was leased to Lord Steamship Co. S.A. (Panama) under the bareboat lease agreement and as the agreement did not confer beneficial ownership in respect of the shares in the ship within the meaning of section 3(4) of the United Kingdom Administration of Justice Act, 1956, Lord Steamship Co. S.A. (Panama) did not have legal or equitable ownership of the ship but only possession and control. The action *in rem* was therefore not maintainable against the ship.

Cases referred to:-

(1) *The "Pangkalan Susu/Permina 3001"* [1977] 2 M.L.J. 129.

(2) *The "Permina 1017"* [1977] 2 M.L.J. 185.

(3) *The "I Congresso Del Partido"* [1977] 1 Lloyd's L.R. 536; [1980] 1 Lloyd's L.R. 23 (C.A.); [1981] 2 Lloyd's L.R. 367 (H.L.).

(4) *The Aventicum* [1978] 1 Lloyd's L.R. 184.

FEDERAL COURT.

C. Abraham for the appellants.

N.T. Vello (*P. Navaratnam* with him) for the respondents.

Cur. Adv. Vult.

Abdoolcader J. (delivering the judgment of the Court): The primal issue in the appeal before us pertains to the construction and effect of a bareboat lease agreement which in turn involves the question of the beneficial ownership of the ship taken under arrest in this admiralty action *in rem*.

The respondents issued the writ in these proceedings on March 26, 1979 for a monetary claim in respect of the appellants' ship "Loon Chong" and her sister ship "Loon Hsing" for goods in the nature of necessaries supplied at the request of the appellants and disbursements made as agents on account of the two ships and on behalf of the appellants between January 1976 and September (later conceded to be April) 1978. The "Loon Chong" was as a result arrested but later released on bail. The appellants then took out a motion on April 7, 1979 to set aside the writ, arrest and all subsequent proceedings and for other relief primarily on the ground that under the provisions of section 3(4) of the United Kingdom Administration of Justice Act, 1956 which apply pursuant to section 24(b) of the Courts of Judicature Act, 1964 an action *in rem* is not maintainable against the appellants as the owners of the "Loon Chong", namely, Melbourne Plaza Navigation (Panama) S.A. ('Melbourne') or the owners of the "Loon Hsing", namely Keras (Panama) S.A. ('Keras'), and applied further by another motion dated May 9, 1979 for the return for cancellation of the bank guarantee furnished on April 30, 1979 for bail for the release of the "Loon Chong". Arulanandom J., held on September 26, 1980 that the bareboat lease agreement we shall advert to presently was not a lease but a mortgage under the guise of a lease and accordingly dismissed both motions with costs.

The crucial and decisive issue that arises for determination and only which we need consider resolves into a consideration of the nature and effect of the transaction entered into culminating in the bareboat lease agreements in respect of the two ships in question and the construction of the several documents effectuating them. It is therefore necessary to set out a brief narrative of the facts for this purpose and the respective contentions advanced by the parties. We should perhaps add that on May 31, 1979 Melbourne sold the "Loon Chong" to Steppington Shipping Co. S.A. on the nomination of the lessee in the bareboat lease agreement and the "Loon Hsing" sank on October 11, 1978 and became a total loss.

The respondents' claim *in rem* is premised on the fact that they were at all material times the agents of Lord Steamship Co. S.A. (Panama) ('Lord') which they say was the beneficial owner of the "Loon Chong" and the "Loon Hsing" and would accordingly be liable in an action *in personam* as both ships were registered under Lord's ownership in Lloyd's Register of Shipping according to a search made by their solicitors. The appellants contend to the contrary that the "Loon Chong" and "Loon Hsing" were sold on October 27, 1977 by Lord to Melbourne and Keras respectively under bills of sale and Panamanian Public Deeds and Permanent Patents were produced in support, and that the respondents' claim should have been directed to Lord which they say is not and has never been the beneficial owner at all or of any of the shares in respect of the two ships at the date of the issue of the writ. The appellants admit that on the same day that the ships were sold Melbourne and Keras as the owners respectively entered into bareboat lease agreements with Lord in respect of the two ships but say this was a normal leasing back arrangement as against the argument of the respondents that the agreements do not constitute a lease as such but a mortgage in the guise of a lease in the light of certain provisions in the agreements. The bareboat lease agreement in respect of the "Loon Chong" was for a period of 36 months at a monthly rent of US$3,476 and that for the "Loon Hsing" was for the same period at a rent of US$8,690 per mensem.

A bareboat lease is akin to and basically in the nature of a charter demise whereby complete control is given to the lessee. A bareboat lease agreement does not confer beneficial ownership in respect of the shares in a ship within the meaning of section 3(4) of the United Kingdom Administration of Justice Act, 1956 which refers only to such ownership as is vested in a person who is the legal or equitable owner and does not apply to the case of a demise charterer or indeed any other person who has only possession of the ship however full and complete such possession might be and however much control thereof he might have (*The "Pangkalan Susu/Permina 3001"*;[1] *The "Permina 1017"*;[2] *The "I Congresso Del Partido"*[3]). Lord did not on the bareboat lease agreements *ex facie* have legal or equitable ownership but only possession and control. It would however be open to the respondents to contend to the contrary on the premise that the documents and transaction entered into were fictitious and the ownership was in fact in Lord at the time of the issue of the writ and the arrest but the burden of proof in this regard would be on the respondents (*The "Aventicum"*[4]).

We would immediately observe that the learned judge arrived at his decision on the view he took of certain provisions in the bareboat lease agreement, accepting in effect the contention advanced for the respondents purely on a pyrrhonic projection of the circumstances. In doing so the learned judge appears to have completely ignored the affidavit of Edward Peter Mackay, an assistant solicitor with Deacons, the Hong Kong solicitors acting for the respondents, who prepared the necessary documentation and explains the surrounding circumstances of the matter and the nature of the leasing back transaction which was effected.

The learned judge referred to Article 4 of the bareboat lease agreement which dispensed with the formal delivery of the ship by the lessor to the lessee. We are unable to see anything wrong in this as that provision specifically states that this was because immediately prior to the execution of the agreement the lessee was in physical possession and control of the ship. An appropriate paradigm of such a situation would be the case of a tenant or lessee in possession who then executes a tenancy agreement or lease in which event no formal entry into or delivery of possession of the premises would be necessary. He then dealt with Article 14 which provides that at the expira-

tion of the lease the lessee shall purchase the ship from the lessor for US$1,000 and held this to be a completely unrealistic sum and disproportionate to the value of the ship and that this right to repurchase was equivalent to an equity of redemption. An equity of redemption is quite different and a provision such as that which appears in Article 14 is a conventional incident of a leasing back transaction and a normal one to be found in such leasing back agreements.

The "Loon Chong" was sold by Lord for US$100,000 and the total monthly rental payable under the bareboat lease agreement would be US$125,136. The "Loon Hsing" was purchased from Lord for US$250,000 and the whole rent payable under the agreement with Keras would amount to US$312,840. The lessors would therefore clearly have made a profit. We should perhaps add that the appellants submit that the sale price in each case was not unreasonable as the two ships were fairly old. In the circumstances the learned judge's reference to the stipulated loss value for the first year in the schedule to the agreement has no relevance as this was only for the purposes of payment by the lessee in the event the ship were to be sold by order of a judicial or other authority while under arrest as provided for in Article 5(6) of the agreement.

Article 5(3) of the agreement requires the lessee to exhibit on board the ship in a conspicuous place a prominent notice to the effect that the ship is the property of the lessor and that neither the lessee nor the master has any right, power or authority to create, incur or permit to be imposed upon the ship any liens whatsoever except for crew's wages and salvage. The legal ownership is also recorded in the Panamanian Registry and is so stated in the navigational and radio licences of the ship. Article 10(1) of the agreement provides for the insurance of the ship by the lessee at its expense during the period of the lease in the name of the lessor and in such form as the latter shall approve in writing, and clause (4) of Article 10 stipulates insurance payments for an actual or constructive or compromised total loss to be made, after satisfying any mortgages, to the lessor who shall distribute the moneys between the lessor and the lessee according to their respective interests and this clause also defines the limited interests of the lessee. Article 18 of the agreement specifically stipulates that the lessor may, without the lessee's consent, transfer, pledge or mortgage the ship subject to the terms of the lease agreement or assign, transfer or pledge all or part of its right thereunder. All these prescriptions would certainly appear to substantiate the appellants' case.

The learned judge also took into account the entry in Lloyd's Register of Shipping showing ownership in Lord. The evidence on record discloses that Lloyd's Register is only a commercial service providing advice for general information as Lloyd's itself admits in a letter to the appellants' solicitors and is not conclusive evidence of ownership. It would certainly have even a considerably lesser effect than a motor vehicle registration book which is not unrebuttable evidence of the ownership of the vehicle. There is no duty on the owners to inform Lloyd's of the transfer of ownership and the respondents made no search in the Panamanian Registry and we would add that even this may not disclose a sale that has yet to be recorded. The respondents further rely on the fact that Lord issued bills of lading but such bills have a demise clause (clause 40 in Lord's Standard Bill of Lading) which exonerates the owners from personal liability.

As we have said earlier Mackay who personally handled this matter and effected the necessary documentation sets out in his affidavit the full circumstances of the matter and the general nature of a leasing back transaction but the learned judge would appear to have completely disregarded this. Mackay says that his firm was instructed by Orient Leasing (Hong Kong) Limited ('Orient') of which both Melbourne and Keras are wholly-owned subsidiaries to prepare the necessary documentation to effect and record the purchase of the two ships from Lord by Melbourne and Keras to enable the purchasers to immediately thereafter bareboat lease the ships back to Lord for three years in each case. Mackay categorically affirms that there was nothing questionable whatsoever in the sale of the ships which were conducted in a proper fashion by companies acting at arm's length and states that Orient is essentially a leasing company whose *modus operandi* is to acquire through its subsidiary companies legal and beneficial ownership of property, including sea-going vessels, for the purposes of leasing out to customers upon terms which normally contain an option exercisable by or an obligation imposed on the lessee to purchase the property on the expiry of the lease for a nominal amount. He adds that such a method of financing — the bareboat lease or bareboat-demise charterparty as it is also frequently termed — is common and is becoming in his experience increasingly more common in the field of ship financing and that it is an entirely legitimate method therefor. He says that by the law of Hong Kong which is the proper law of the contract under Article 20 of the agreement, the bareboat lease agreements are in essence hire-purchase contracts and that the legal and beneficial ownership of each vessel therefore belongs to the registered owner, namely Melbourne in the case of the "Loon Chong" and Keras in that of the "Loon Hsing", until the expiration of the lease whereupon Lord can acquire back legal title to each ship for US$1,000.

The respondents further seek to rely on an agreement dated October 26, 1977 for the sale of the two ships together with a third one by Lord to another party but Mackay in his affidavit carefully explains what actually transpired to show that the agreement of October 26, 1977 was never performed or carried into effect and was in fact superseded by the transaction entered into by Lord with Melbourne and Keras under the purchase and bareboat lease agreements. The respondents go on to rely on information they received from a C.Y. Yeo, the former Managing Director of Ocean Maritime (Pte.) Ltd., Singapore, Lord's general agents in Singapore and Malaysia, that the "Loon Chong" and "Loon Hsing" and two other ships were mortgaged to Orient for US$500,000 at all material times. They accordingly contend that the purported sale of the two ships to Melbourne and Keras was in fact a transfer of Lord's interest in both by way

of security for the repayment of the loan to Orient which wholly owns Melbourne and Keras and that the latter two companies are accordingly to all intents and purposes mortgagees of the two ships. Mackay in his affidavit refutes this allegation as completely untrue and demonstrates the confusion and total lack of comprehension on the part of Yeo in respect of the legalities of the transaction between Melbourne and Keras on the one hand and Lord. He shows quite clearly that Yeo was well aware of the transaction entered into and the documents evidencing the sale by Lord to Melbourne and Keras and the bareboat lease effected and indeed Yeo signed as a guarantor for the lease agreements.

Mackay makes a pertinent point when he states that if Orient were the mortgagee of the ships it would have needed to record such mortgages in Panama to protect its security as under Panamanian law there is no concept equivalent to an equitable mortgage as exists in English law and the holder of an unregistered mortgage of a Panamanian vessel would not have a valid and enforceable mortgage at all under the law of the flag of the vessel. If Orient had intended that the finance provided by it should be secured by way of mortgage it would have proceeded on that basis and obtained a mortgage on each ship in its favour but it chose however to adopt the normal method of financing employed by it of acquiring registered and beneficial ownership of the ships in the name of its wholly-owned Panamanian subsidiary corporations and bareboat leasing them to Lord. It is of some considerable significance that Orient's security consequently lay in having title to the ships and that it did not have the security of a mortgage and the priority afforded as a result as against other claims which the ships might attract in the process of trading.

In the light of the several matters we have discussed we allowed this appeal with costs here and in the court below after hearing argument, set aside the order of the learned judge and made an order setting aside the writ, the warrant of arrest and the arrest of the "Loon Chong" and all subsequent proceedings in the action and for the guarantee dated April 30, 1979 given by the United Malayan Banking Corporation in the sum of $150,000 to be forthwith returned to the appellants for cancellation and directed the deposit lodged in court by way of security to be refunded to the appellants.

Appeal allowed.

Solicitors: *K.S. Choo & Co.; Chang & Vello.*

TAIPING OIL INDUSTRIES SDN. BHD. v. NATIONAL UNION OF PLANTATION WORKERS & ANOR.

[O.C.J. (Hashim Yeop A. Sani J.) August 20, 1981]
[Kuala Lumpur — Originating Motion No. A 12 of 1979]

Industrial Relations — Scope of s. 27(1) & (2) of the Industrial Relations Act, 1967.

Jurisdiction — Whether Industrial Court had exceeded its jurisdiction in questioning the locus standi of a person — Scope of s. 27(1) & (2) of Industrial Relations Act, 1967.

The applicants sought for an order of certiorari to quash the decision of the Industrial Court of April 3, 1979. In the award it was set out that at the commencement of the hearing of the reference under section 26(2) of the Industrial Relations Act 1967, the Industrial Court found it necessary to hear further evidence to establish the nature of the employment of one Gomez with the company after objection was raised by the other party on the *locus standi* of the said Gomez. At the end of the hearing on this point the Industrial Court came to the conclusion that Gomez was not a *bona fide* and permanent employee of the applicant company and therefore had no *locus standi* in these proceedings. This was the decision sought to be challenged.

The main issue before the court was whether the Industrial Court had exceeded its jurisdiction in questioning the *locus standi* of Gomez.

Held, dismissing the applications: (1) the question whether any person has *locus standi* before any court is a question of procedure for that court. The Industrial Court could not be said to be acting outside or in excess of jurisdiction when it wanted to satisfy itself as to the *capacity* of Gomez to appear before it;

(2) in a proceeding of this nature the court is not required to go into the merits of the award and the duty of the court is only to find if the decision challenged was made without or in excess of jurisdiction. Certiorari will not issue as a cloak of appeal in disguise.

Cases referred to:-

(1) *Printers (Mysore) Pte. Ltd.* v. *Labour Court Bangalore & Ors.* A.I.R. 1960 Mysore 44.

(2) *R.* v. *Northumberland Compensation Appeal Tribunal* [1951] 1 All E.R. 268.

ORIGINATING MOTION.

K. Chandran for the applicant.

D.P. Xavier for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani J.: The applicant is asking for an order of *certiorari* to quash the decision of the Industrial Court handed down on April 3, 1979 contained in award (Exhibit P8) attached to the affidavit supporting the motion. In the award it is clearly set out that at the commencement of the hearing of the reference under section 26(2) of the Industrial Relations Act, 1967 the Industrial Court found it necessary to hear further evidence to establish the nature of the employment of Encik Gomez with the applicant company after objection was raised by the other party on the *locus standi* of Encik Gomez. At the end of the hearing on this point the Industrial Court came to the conclusion that Encik Gomez was not a *bona fide* and permanent employee of the applicant company and therefore had no *locus standi* in these proceedings. This was the decision sought to be challenged.

The applicant gave six grounds on which relief is sought. In my view all the grounds relate primarily to the merits of the case except ground 3 which stated